

NTSB Order No. EA-4283

Adopted by the NATIONAL TRANSPORTATION SAFETY BOARD
at its office in Washington, D.C.
on the 10th day of November, 1994

Docket SE-13258

another airman's medical certificate for the purpose of providing their employer, a Part 135 operator, with a copy of the medical certificate showing an altered issuance date. Respondent was charged with violating 14 C.F.R. 67.20(a)(3).² For the reasons discussed below, the appeal is denied and the initial decision is affirmed.

The following facts were established at the hearing, and are not disputed by respondent on appeal. During the time period at issue (late 1990), respondent was employed by Rocky Mountain Helicopters (RMH) as lead pilot of their Billings, Montana operation. As lead pilot, he was responsible for, among other things, ensuring that the pilots under his supervision took required check rides on a timely basis, and maintained current medical certificates. Towards that end, respondent received -- and was expected to follow up on -- periodic printouts from RMH headquarters in Provo, Utah, listing those pilots who would soon be due for check rides and medical certificate renewal.

Despite the existence of these company procedures, the medical certificate of one of the pilots under respondent's supervision (Karl Kolb) expired, unnoticed, at the end of

² Section 67.20(a)(3) provides as follows:

§ 67.20 Applications, certificates, logbooks, reports, and records: Falsification, reproduction, or alteration.

(a) No person may make or cause to be made --

* * *

(3) Any reproduction, for fraudulent purpose, of any medical certificate under this part;

* * *

September, 1990. Mr. Kolb continued to fly Part 135 flights throughout the month of October before he noticed, on October 29, 1990, that his medical certificate had expired. He renewed the certificate that same day and -- in accordance with company procedures -- sent a copy of his new certificate to the pilot records clerk at the RMH main office in Provo, Utah. It was established that pilot records, including those documenting pilot medical certification, were maintained by RMH at a central location so that the company could track the certification status of its pilots, and also so that required records would be available for FAA audits and inspections, which are conducted at least annually.

After learning of the lapse in Mr. Kolb's medical certificate, respondent suggested during a pilot's meeting on November 5, 1990, that the earlier-submitted copy of the certificate should be replaced with another copy that had been altered to show an issuance date of "9/29/90" rather than "10/29/90."³ According to Mr. Kolb's testimony, which was credited by the law judge and not rebutted by respondent at the hearing, respondent made a copy of the medical certificate and, after pasting a "9" over the "10," again copied the certificate.

³ This meeting, as well as a subsequent pilot's meeting on November 21 where the plan to alter Mr. Kolb's medical certificate was also discussed, was tape recorded and transcribed by one of the pilots present. The pilot who made the tape indicated that he sometimes taped what was said at pilot meetings run by respondent, for his own "protection." (Tr. 16.) According to Mr. Kolb, respondent did not always handle things according to standard company procedures. (Tr. 55.)

The copy of the altered certificate was then sent to the pilot records clerk in Provo as a replacement for the previously-submitted certificate, and placed in Mr. Kolb's individual file.

Some time later, RMH management was alerted to the irregularity in Mr. Kolb's medical certificate, and to respondent's role in the scheme. The incident was investigated, and respondent was ultimately fired from RMH.

At the hearing in this case, respondent presented no evidence or testimony to rebut the Administrator's evidence, citing the pendency of a related criminal matter. In closing argument, respondent asserted that the Administrator was obligated to prove all of the elements of fraud, citing Hart v. McLucas, 535 F.2d 516, 519 (9th Cir. 1976), where those elements were discussed in connection with an alleged violation of section 61.59(a)(2) (prohibiting "fraudulent or intentionally false" entries in required records or reports).⁴ Respondent argued that in this case the Administrator failed to prove the fifth element of fraud: action taken in reliance upon the false representation.

In his initial decision, the law judge upheld the order of revocation, finding that respondent's conduct in this case was a violation of section 67.20(a)(3). In response to respondent's closing argument, he noted his belief that it was not necessary

⁴ In Hart, the court noted that the elements of fraud have traditionally been defined as: (1) a false representation; (2) in reference to a material fact; (3) made with knowledge of its falsity; (4) with intent to deceive; and (5) with action taken in reliance upon the representation. The Court further held that the elements of intentional false statement were the first three elements of fraud.

to prove all of the elements of fraud identified in Hart in order to prove that a reproduction was made "for fraudulent purpose," in violation of section 67.20(a)(3). Nonetheless, the law judge held that all of those elements had been proven. Specifically, regarding the fifth element, he found that RMH had relied on the copy of the altered certificate as evidence of Mr. Kolb's certification status during the month of October, and had placed it into its files in fulfillment of its duty to document the medical certification status of its pilots. He also stated that the altered certificate was filed with the intent (on respondent's part) that the FAA would rely on it as well, and indicated that potential reliance under these circumstances was sufficient.

On appeal, respondent continues to assert that all five elements of fraud should have been proved, and challenges the law judge's statement that proof of the fifth element -- action taken in reliance -- is not necessary to establish a violation of section 67.20(a)(3). He further contests the law judge's finding that potential reliance is sufficient to prove that element.⁵ Respondent does not dispute that the other elements of fraud were established: falsity, materiality, knowledge, and intent to deceive. Nor does he contest that revocation is the appropriate

⁵ Respondent's brief does not acknowledge the law judge's additional finding that there was actual reliance by RMH. In view of our holding in this case that actual reliance is not necessary to prove a violation of section 67.20(a)(3), we need not decide whether the law judge's finding of actual reliance is supported in the record.

sanction in this case if the violation is upheld.

In Administrator v. Borregard, NTSB Order No. EA-3863 (1993), we concluded that all five elements of "fraud" need not be proved in order to establish a violation of a regulation which refers only to "fraudulent purpose." While Borregard involved section 43.12(a)(3), prohibiting alteration of maintenance records "for fraudulent purpose," our comments there are equally applicable to the section at issue in this case, 67.20(a)(3), which prohibits reproduction of a medical certificate "for fraudulent purpose":

The Administrator argued . . . that the fifth Hart criterion -- action taken in reliance on the false representation -- should be modified here to reflect the different language of (a)(3). Thus, according to the Administrator, all that should be required is proof of an intent that someone rely on the alteration, not proof of actual reliance.

Hart discussed the fraud criteria only in passing, as the issue before the court was the knowledge required for an intentional falsification finding under (a)(1). Even assuming Hart applies to subsection (a)(3) cases, where the question is only whether an alteration was made with a fraudulent purpose in mind, not whether the entry itself perpetrated a fraud, we think that Hart's applicability in (a)(3) cases is logically concluded with our inquiry into whether a respondent intended to deceive, as this inquiry mirrors the regulation's prohibition against fraudulent purpose.

Id. at 8-9.

Thus, the law judge was clearly correct in concluding that the Administrator was not obligated to prove action taken in reliance in order to establish a violation of section 67.20(a)(3). Proof of intent to deceive is sufficient to show a fraudulent purpose under that section. The law judge's

additional conclusion that action taken in contemplation of potential reliance is sufficient to establish a violation, is simply a different articulation of this same concept.

In sum, we affirm the law judge's conclusion that respondent made or caused to be made a reproduction of a medical certificate for a fraudulent purpose, in violation of section 67.20(a)(3), and we uphold the revocation of respondent's pilot certificate.

ACCORDINGLY, IT IS ORDERED THAT:

1. Respondent's appeal is denied;
2. The initial decision is affirmed; and
3. The revocation of respondent's pilot certificate shall commence 30 days after the service of this opinion and order.⁶

HALL, Chairman, LAUBER, HAMMERSCHMIDT and VOGT, Members of the Board, concurred in the above opinion and order.

⁶ For the purpose of this opinion and order, respondent must physically surrender his certificate to an appropriate representative of the FAA pursuant to FAR § 61.19(f).